

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHEILA A. THORNTON
Claimant

VS.

LABETTE CTR. MENTAL HEALTH SERV.
Respondent

AND

LIBERTY MUTUAL INSURANCE CO.
Insurance Carrier

Docket No. **1,025,374**

ORDER

Claimant requests review of the August 21, 2008 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

A preliminary hearing was held on March 19, 2008. On March 31, 2008, the Administrative Law Judge (ALJ) issued an Order referring claimant for an independent medical examination and opinion regarding causation for claimant's visual condition as well as treatment recommendations. That examination occurred on April 10, 2008.

On August 6, 2008, it appears the parties again discussed the matter with the ALJ but the discussion was off the record. The ALJ then issued an Order dated August 21, 2008, which ordered respondent to pay 12 weeks of past due temporary total disability benefits as well as bills from Drs. Rothstein and Whitaker. The ALJ ordered Grene Vision Group to treat claimant's visual problems. The ALJ further ordered respondent to provide a list of three neurosurgeons from which claimant can choose an authorized treating physician.

Claimant requests review and argues the ALJ erred in awarding claimant temporary total disability benefits. The administrative file contains letters from claimant's counsel to the ALJ wherein claimant argues that the evidentiary record established she was entitled to more days of past due temporary total disability compensation than the ALJ awarded.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Initially, the Board must determine whether it has jurisdiction to consider claimant's appeal from the preliminary finding. A written request for Board review of a decision made by an ALJ is governed by K.S.A. 44-551(i)(1) which provides in pertinent part:

All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation.

The ALJ entered the Order on August 21, 2008. Accordingly, the effective date of the Order was the day after or August 22, 2008.¹ The written application for review is only considered timely filed if received in the central office or one of the district offices of the division of workers compensation on or before the tenth day after the effective date of the order.² Excluding intermediate Saturdays, Sundays, and the September 1st holiday, ten days after the effective date of the Order would be September 8, 2008. Claimant's application for review was filed by fax³ and received on September 11, 2008. Consequently, the application for review was not timely filed and the appeal is dismissed.

Moreover, the claimant appeals from the ALJ's determination of the number of days she was entitled to temporary total disability compensation. The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.⁴ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.⁵

¹ See K.S.A. 44-525.

² See K.A.R. 51-18-2(b).

³ See K.A.R. 51-18-2(c).

⁴ K.S.A. 44-551.

⁵ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

The issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁶

An ALJ has the jurisdiction and authority to either grant or deny temporary total disability benefits at a preliminary hearing. The ALJ may decide this question and has the jurisdiction to decide it wrongly. Accordingly, this Board Member further finds that even had the appeal been timely filed the Board does not have jurisdiction to consider the issue raised by claimant at this juncture of the proceedings.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

WHEREFORE, it is the finding of this Board Member that claimant's application for review was not timely filed and is hereby dismissed.

IT IS SO ORDERED.

Dated this _____ day of October 2008.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Kala Spigarelli, Attorney for Claimant
Andrew Wimmer, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

⁶ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁷ K.S.A. 44-534a.

⁸ K.S.A. 2007 Supp. 44-555c(k).